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No. 386

In the Supreme Court of the United States

OCTOBER TERM, 1961

F. L. McCLANAHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 15-29) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 7, 1961. (Pet. 30.) A petition for rehearing was denied on August 10, 1961. (Pet. 31.) The petition for a writ of certiorari was filed on September 5, 1961. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether, in the context of the whole charge to the jury, the trial judge committed reversible error by stating, as part of an instruction that willfulness could be proved by circumstantial evidence, that "In determining the guilt of the defendant, the willfulness of the act becomes apparent," where he meant to say, as stated in the written instructions which he had prepared and which were given to the jury, that such willfulness was "important."

RULE INVOLVED

Federal Rules of Criminal Procedure:

RULE 30. INSTRUCTIONS

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT

Petitioner was convicted by a jury of willfully attempting to evade a substantial amount of income tax ($48,061.58) owing for the fiscal year ended March 31, 1951 (R. 4-5),[1] and was sentenced to thirteen months' imprisonment and a fine of $10,000 (R. 263-264).

The court's charge, as shown by the transcript (R. 246-258), included the following instruction (R. 250, emphasis added):

> In determining the guilt of the defendant, the willfulness of the act becomes *apparent*. When an act is willfully done it may not always be proved by direct evidence; it may often be inferred from the conduct of the parties, taking into consideration that the normal mind must realize the probable consequences of his act. Willfulness may be inferred by the doing or saying of those things designed to bring about and put into effect or into course of operation an unlawful act. This may be inferred from the direct evidence of the several acts and general conduct of the parties. It may, likewise, be gathered from the circumstances surrounding the acts of the parties. These circumstances may be considered along with any direct evidence.

The charge had been written out by the judge and was read by him to the jury (R. 260, 304-305). In the written charge, the italicized word "apparent" in the foregoing instruction read "important" (R. 260, 262).

After the charge was given, and in response to the

[1] "R." refers to the transcript of record in the Court of Appeals.

court's request for any exceptions, defense counsel stated that the word "apparent" was "inadvertently in the charge" instead of "important" (R. 259; see R. 279, 280, 282). The court after examining the written charge, replied (R. 260): "Well, it is written 'important', and I think I said it that way." See, also, R. 281-285. No formal exception was taken to the sentence containing the word "apparent" (R. 259), although exceptions were taken to other portions of the charge (R. 259-262). The written charge, which included the word "important" (R. 262), was given to the jury at its request during its deliberations (R. 284-285).

The court of appeals, in unanimously affirming the conviction, held (Pet. 20) that "no reversible error occurred for the inadvertent use of the word 'apparent' by the court." The court ruled (Pet. 19) that "there was no clear request by counsel that the court correct the charge," and that counsel "clearly left the court with the impression that he was satisfied with the judge's belief that he had used the right word"; and that "while the word 'apparent' would not be correct in the challenged sentence, we think the subsequent parts of the charge adequately protected the accused."

ARGUMENT

The sole question presented by the petitioner is whether the trial court committed reversible error when it inadvertently used the word "apparent" instead of "important" in the portion of its charge explaining to the jury that willfulness could be proved by circumstantial evidence. Assuming that the particular sentence, if considered alone, was erroneous because it was an improper comment by the court on the evidence, the

court of appeals nevertheless correctly held that, in all the circumstances, no reversible error occurred. For the charge as a whole clearly informed the jury that it was to determine, solely on the basis of the evidence, whether the defendant's acts were willful; and the court explicitly warned the jury to disregard any impression it might have formed as to how the court believed the case should be decided. Furthermore, petitioner took no exception to the inadvertent use of the word "apparent."

1. The statement "In determining the guilt of the defendant, the willfulness of the act becomes apparent," was a single sentence of a six-sentence paragraph explaining how willfulness could be established. The paragraph was one of five consecutive paragraphs in which the court fully and carefully explained that element of the crime (R. 249-250). The particular paragraph in which the court inadvertently used the word "apparent" itself clearly indicated that it was for the jury to decide whether the defendant's acts were willful. Thus, the court pointed out (R. 250) that "[w]illfulness may be inferred by the doing or saying of those things designed to bring about and put into effect or into course of operation an unlawful act," or "from the direct evidence of the several acts and general conduct of the parties."

After concluding the instructions on willfulness and on circumstantial evidence, the court charged (R. 251) that, in order to convict, the jury must "find from the evidence and believe beyond a reasonable doubt" that the defendant "did willfully and knowingly attempt to conceal the amount of his income and evade the pay-

ment of taxes thereon * * *." The court had previously informed the jurors (R. 248) that they "are the exclusive judges of the weight to be given to the testimony, and of the credibility of the witnesses," and it reiterated this point when it told the jury (R. 252):

> Another thing for you to bear in mind is that this charge should be taken as a whole and do not "hang your hat" as it were, upon one point or peg without giving due consideration to all the evidence before you and all of the provisions of the charge. And if during the trial, or from this charge, you have gathered any impression as to how the Court feels about the case or the nature of the verdict that should be rendered, you will disregard that also, because the Court is the judge of the law only and you as jurors are judges of the facts.

The effect of the particular sentence about which petitioner complains must be considered in the light of the entire charge, and cannot be viewed in isolation. *Boyd* v. *United States*, 271 U.S. 104, 107. Viewed as a whole, the charge properly instructed the jury that it was for them to determine whether the petitioner's acts were willful; and the trial judge made it clear that he was indicating no personal views as to the defendant's guilt or innocence. Any prejudicial effect that otherwise might have resulted from the isolated statement that "the willfulness of the act becomes apparent" was cured by the remaining portions of the charge and the specific admonition that the jury was to "disregard" any impression it might have gathered "from this charge * * * as to how the Court feels about the case

or the nature of the verdict that should be rendered * * *."[2] Furthermore, the written charge, which contained the word "important," was given to the jury at its request, and was available to it.

2. Although defense counsel called the trial judge's attention to the inadvertent use of the word "apparent" as soon as the charge was completed, he did not press the point further when the judge stated he had used the word "important" (R. 259-60). At that point, he could have requested the judge to recall the jury and reread the pertinent portion of the charge. The trial judge, in denying rehearing, stated (R. 305) that if defense counsel "had insisted that he was right at the time, as he now insists, we would have, on our own motion, called the jury back and read the charge to them."

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[2] The cases which petitioner cites (Pet. 9-11) as establishing the prejudicial character of the instructions in the present case are clearly distinguishable. In all of them, the judge's comments clearly manifested his belief that the defendant was guilty; in none of them was the statement inadvertent.

Thus, in *United States* v. *Murdock*, 290 U. S. 389, the trial judge announced his opinion that the Government had proved the defendant guilty beyond a reasonable doubt. In *Quercia* v. *United States*, 289 U. S. 466, 468, the trial judge virtually instructed that the defendant's flight was conclusive proof of guilt, and stated that "every single word that man said, except when he agreed with the Government's testimony, was a lie"—a conclusion to which the court was drawn at least partly by its observation that the defendant "wiped his hands during his testimony." In *Sullivan* v. *United States*, 178 F. 2d 723 (C.A. D.C.), the appellate court considered that the instructions there given were "tantamount to expressing the court's judgment that the defendant was guilty."

In the present case, however, as shown in the text, the trial judge made it clear that he was expressing no view as to the guilt or innocence of the defendant, and that the determination of whether the defendant's acts were willful, like the determination of all the other factual questions, was solely a matter for the jury.

In these circumstances it appears, as the court of appeals stated (Pet. 19), that defense counsel "left the court with the impression that he was satisfied with the judge's belief that he had used the right word," and "thus waived any criticism that might have been available to him if he had made it clear to the court that he disagreed with the judge's understanding." See *Johnson* v. *United States*, 318 U.S. 189, 200-201; Rule 30, Federal Rules of Criminal Procedure, *supra*, p. 2.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectively submitted,

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